Khoo Cheng Nee v Lubin Chiew Pau Sing

HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33–244–93
ABDUL WAHAB PATAIL JC
5 JANUARY 1996

Family Law *— Children — Custodianship — Application for — Welfare of children paramount though not sole consideration — Whether the welfare of each child must be considered separately when there is more than one child — Whether improvement to welfare is sufficient to justify change of custody — Whether advantages are real and not merely promissory or speculative — Law Reform (Marriage and Divorce) Act 1976 s 88(3) & (4)*

Family Law *— Children — Custodianship — Application for — Factors to be considered — Adultery by petitioner — Whether adultery sufficient ground to disqualify a mother from obtaining custody — Limited financial means of petitioner — Whether petitioner will be able to exercise her rights of access if custody given to respondent*

The petitioner applied for the dissolution of her marriage to the respondent and, inter alia, for custody of her two children aged seven and ten respectively together with monthly mainyenance of RM1,000 per child. In his reply, the respondent also prayed that the marriage be dissolved but that the custody of the children be given to him. For the better part of the children's lives, they have been with their mother. Amongst other allegations, the respondent has alleged that the petitioner was living in immoral circumstances with different men, and was therefore unsuitable to have custody of the children. The petitioner admitted to the relationships with different men and also that her financial position was precarious.

Held, granting custody of both children to the petitioner but the respondent is to remain legal guardian:

(1) The wishes of the parents as to custody are in opposition to one another, therefore the welfare of the children was the paramount, although not the sole, consideration. Here, the court was concerned with the custody of two children. Where the question to be decided is the custody of more than one child, under s 88(4) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), the welfare of each child must be considered separately. In this case, the two children were of the same sex with only three years age difference which explained their closeness to one another. It would only add to their trauma of having feuding parents for the two children to be separated at this juncture. Therefore, the interests of the children were best served if they were not separated in any custody decision (see pp 178H–I, 179B–D).

(2) Under the second part of s 88(3) of the Act, it is undesirable to disturb the life of a child by changes of custody. A party seeking

an order for custody away from the children's current arrangements must show that what he or she offers better benefits the welfare of the children. The court must evaluate whether the improvement to the welfare of the child is sufficient to justify disturbing the life of the child by that change of custody. It has to be shown there will be positive advantages accruing for the welfare of the children by that change. Those advantages must be real and not merely promissory or speculative. Here, the children for the better part of their lives had been with their mother and the advantages suggested by the respondent remained speculative. He should therefore establish a stable home before making an application (see p 179D–F, I).

(3) Dubious as the petitioner's conduct may be, the only concern was what exactly the children was exposed to, and whether it was contrary to their welfare. Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. Merely that another person has emerged in the petitioner's life was not necessarily by itself bad for the children (see pp 180G–I, 181A–B; *Loura Dorris a/p Laurence v Thuraisingam a/l James* [1995] 2 MLJ 229 distinguished).

(4) If custody were given to the respondent, he would take the children to Kota Kinabalu. The petitioner's ability to utilize any access order was very limited given her financial circumstances. If custody were given to the petitioner, the respondent having better financial resources, would be better able to exercise his access rights (see p 181C).

(5) The maintenance and upkeep of the children should be the shared responsibility of both the petitioner and the respondent. Accepting the respondent's salary as RM3,000, a generous budget for the children would be 30%. Considering the funds needed for air fare to visit the children, the sum available for the children would be about 20% of his salary. The respondent should thus pay maintenance of RM300 per child per month (see pp 181F–G, 182A–B,183B).

Per curiam:

The court will normally favour the parent who will best maintain stability in the child's surroundings. There is no set standard as to what constitutes 'stability', but a judge looks for continuity in a child's life. To the degree possible, a judge will try to maintain continuity in, for example, a child's school, community and religious ties (see p 182C–D).

[Bahasa Malaysia summary

Pempetisyen memohon untuk pembubaran perkahwinannya dengan penentang dan, antara lainnya, untuk jagaan kedua anaknya yang

berumur tujuh dan sepuluh tahun masing-masing bersama dengan nafkah bulanan sebanyak RM1,000 seorang anak. Dalam jawapannya, penentang juga memohon untuk perkahwinan itu dibubarkan tetapi jagaan kedua anaknya diberikan kepadanya. Sebahagian besar hayat kedua budak itu, mereka telah tinggal bersama ibu mereka. Di antara pengataan yang lain, penentang telah mengatakan bahawa pempetisyen hidup dalam keadaan yang tidak bermoral dengan lelaki-lelaki lain, dan oleh itu, tidak sesuai untuk mendapatkan jagaan kedua anaknya. Pempetisyen mengaku mengenai hubungannya dengan lelaki-lelaki lain dan juga bahawa keadaan kewangannya tidak menentu.

Diputuskan, memberikan jagaan kedua anak itu kepada pempetisyen tetapi penentang masih menjadi penjaga di sisi undang-undang:

(1) Kehendak kedua ibu bapa mengenai jagaan berlawanan di antara satu sama lain, oleh itu kebajikan budak itu adalah pertimbangan yang utama walaupun bukan satu-satunya pertimbangan yang perlu. Di sini, mahkamah perlu menentukan soal jagaan kedua budak itu. Di mana persoalan yang harus dipastikan adalah mengenai jagaan lebih daripada seorang anak, di bawah s 88(4) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta itu'), kebajikan setiap anak mesti dipertimbangkan berasingan. Di dalam kes ini, kedua budak itu mempunyai jantina yang sama dengan perbezaan umur tiga tahun sahaja yang menjelaskan kerapatan mereka di antara satu sama lain. Ia hanya akan menambahkan trauma mereka dengan persengketaan di antara ibu bapa mereka jika mereka dipisahkan pada masa ini. Maka, demi kepentingan kedua budak itu, mereka tidak patut dipisahkan dalam mana-mana keputusan mengenai jagaan (lihat ms 178H–I, 179B–D).

(2) Di bawah bahagian kedua s 88(3) Akta itu, adalah tidak digalakkan untuk mengganggu kehidupan seseorang budak dengan penukaran jagaan. Pihak yang memohon satu perintah jagaan yang lain daripada aturan hidup semasa budak itu mesti menunjukkan bahawa dia dapat memberikan faedah-faedah yang lebih baik terhadap kebajikan budak itu. Mahkamah mesti menilai sama ada perbaikan kebajikan budak itu mencukupi untuk menjustifikasikan gangguan kepada kehidupan budak itu dengan pertukaran jagaan itu. Adalah perlu ditunjukkan bahawa terdapat faedah-faedah yang positif ke atas kebajikan kanak-kanak itu melalui pertukaran itu. Faedah-faedah itu mestilah sebenar dan bukan hanya sekadar perjanjian atau spekulatif sahaja. Di sini, kedua budak itu telah hidup bersama ibu mereka hampir sepanjang hayat mereka dan faedah-faedah yang disebut oleh responden hanyalah spekulatif. Dia sepatutnya mendirikan rumah yang stabil sebelum membuat permohonan ini (lihat ms 179D–F, I).

(3) Walaupun kelakuan pempetisyen sememangnya diragui, apa yang dikhuatiri adalah apakah yang sebenarnya kedua budak itu terdedah kepada, dan sama ada ia adalah bertentangan dengan kebajikan mereka. Kelakuan zina, walaupun tidak disukai oleh masyarakat, dengan sendirinya bukan menjadi alasan yang cukup untuk tidak melayakkan seseorang ibu daripada mendapat jagaan anak-anaknya. Hanya dengan kehadiran orang lain dalam hidup pempetisyen tidak semestinya dengan sendirinya tidak baik untuk kedua anaknya (lihat ms 180G–I, 181A–B; *Loura Dorris a/p Laurence v Thuraisingam a/l James* [1995] 2 MLJ 229 dibeza).

(4) Jika jagaan diberikan kepada penentang, beliau akan membawa budak itu ke Kota Kinabalu. Keupayaan pempetisyen menggunakan apa-apa perintah akses sangatlah terhad memandangkan keadaan kewangannya. Jika jagaan diberikan kepada pempetisyen, penentang, dengan sumber kewangan yang lebih baik, berada dalam kedudukan yang lebih baik untuk menggunakan hak aksesnya (lihat ms 181C).

(5) Nafkah budak itu harus menjadi tanggungjawab bersama kedua-dua pempetisyen dan penentang. Mengambil gaji penentang sebagai RM3,000, perbelanjaan yang murah hati untuk budak itu adalah 30%. Memandangkan wang yang diperlukan untuk tambang penerbangan untuk melawat budak itu, jumlah yang ada untuk budak itu adalah lebih kurang 20% gaji penentang. Penentang oleh itu harus membayar nafkah sebanyak RM300 sebulah untuk setiap budak itu (lihat ms 181F–G, 182A–B, 183B).

Per curiam:

Mahkamah biasanya menyokong ibu atau bapa yang paling dapat mengekalkan kestabilan persekitaran budak itu. Tidak terdapat taraf yang tetap mengenai apa yang dimaksudkan oleh 'kestabilan', tetapi seseorang hakim akan mencari kesinambungan dalam kehidupan seseorang budak. Setakat mana yang boleh, seseorang hakim akan cuba mengekalkan kesinambungan di dalam, contohnya, sekolah budak itu, pertalian komuniti dan agama budak itu (lihat ms 182C–D).]

[*Editorial note*: The petitioner has appealed to the Court of Appeal on the question of legal guardianship granted to the respondent.]

Notes

For cases on custodianship of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766–1831.

Case referred to

Loura Dorris a/p Laurence v Thuraisingam a/l James [1995] 2 MLJ 229

Legislation referred to

Guardianship of Infants Act 1961 ss 3, 11
Law Reform (Marriage and Divorce) Act 1976 s 88
Married Women and Children (Maintenance) Act 1950 s 3

M Manoharan (*Karpal Singh & Co*) for the petitioner.
A Kanesalingham (*Kanesalingam & Co*) for the respondent.

Abdul Wahab Patail JC: This petition filed on 2 September 1993 is for the following orders:

(1) that the petitioner's marriage to the respondent of 6 January 1985 be dissolved;

(2) that custody, care and control of the children of the marriage, Joshua Ezekiel Lubin born 23 July 1985, and Caleb Mikhail Lubin born 17 May 1988, be given to the petitioner;

(3) that the respondent pays maintenance in the sum of RM1,000 per child, and that no maintenance be provided for the petitioner;

(4) that the respondent be given reasonable access to the children in the presence of the petitioner or her family member; and

(5) such other orders as the court thinks fit and proper.

The respondents' counsel in Kota Kinabalu had informed him of the proceedings and to engage counsel on 30 December 1993. They had withdrawn from representing him due to difficulties in contacting him. As a result, an order for substituted service of the petition was applied for on 6 April 1994 and granted on 5 May 1994.

The petitioner was an air hostess when she met and married the respondent, who was a third officer on a ship. She claims all her money was spent as he took long leave without pay. She had to stop working as the date of birth of their first child approached. The respondent had left her behind during that time in Kota Kinabalu. After their child was born, the petitioner had to work with a travel agency in Kota Kinabalu to support the child as the respondent was away most of the time. She earned RM600 per month. The respondent's family in Kota Kinabalu did not assist her. Her family had to come from Sungai Petani to help the petitioner look after the child.

In 1986, she had a better pay but she was persuaded by the respondent to move to Labuan where he has been promoted to First Officer. As she was carrying her second child, the respondent had mistreated her. In 1992, she was asked by the respondent to find work again as he was not going to support her and the children. The petitioner had then returned to Sungai Petani to leave her children with her parents and she returned to work as an air hostess. They had agreed to file a joint petition for divorce. He had suddenly changed his mind. The marriage had broken down irretrievably.

The respondent when visiting with the children had flown them via Penang to Kota Kinabalu. The children had mentioned that the respondent said he would bring them to Hong Kong. In the circumstances, the petitioner had applied for and obtained an interim custody order from the Shah Alam High Court.

The respondent in his reply said that the petitioner had in March 1986 left Kota Kinabalu to live in Selangor. He had joined them on 14 April 1986 until 9 July 1986. After that they had stayed together in Labuan until 16 September 1988. The second son was born in Labuan.

On 16 September 1988, both parties had gone to the United Kingdom with their children. On 17 December 1988, they had returned with their children to Labuan and stayed till 14 February 1990, and then moved to Kota Kinabalu until October 1990. Between October and December 1990, the petitioner went with their children to Sungai Petani and after December 1990 the respondent had brought the petitioner back to Kota Kinabalu. In May 1992, the petitioner had worked as an air hostess again, living in Kuala Lumpur while the children were left with the grandparents in Sungai Petani.

He had continued to send her RM1,000 per month until February 1986. He earned RM1,100 per month yet she wanted to move out to stay separately from his family. She brought her parents resulting in his having to support them also. She refused assistance from his family. Yet he had continued to send her RM1,000 per month to her bank account.

He complained he had no proper access to the children in Sungai Petani, and when he did, her family members were always there. He alleges the respondent's mother did not feed the children properly. He alleged he had provided for her at all times and she never needed to work.

He denied that in 1992 he refused to support them. He said that she had gone back to work to help raise money to enable him to take a full time course as a master mariner and he continued to send her S$400 per month. She would have needed to work about a year only, but when she started earning about RM2,400 per month, she felt herself becoming independent and did not want him to send money.

He objected to divorce on religious grounds. They tried separation but it did not improve her conduct. He said he had no house in Hong Kong and no plans to stay there. He did not have opportunity to contest the application in the Shah Alam High Court before because he received the documents late.

The petitioner, on the other hand, deposed later that he had told her he intended to move to Hong Kong.

He says he had no access since May 1993 to see the younger son and from January 1994 to see the elder son. He agreed the marriage had broken down.

The respondent alleged that while working with the travel agency in Kota Kinabalu, which the petitioner chose to do, she had an association with a ticketing clerk, and while working again as an air hostess she had an

affair with an airbus pilot. He alleges the petitioner is living in immoral circumstances with different men, therefore unsuitable to have custody of the children.

The respondent prayed in his reply that the marriage be dissolved, custody of the children be given to the respondent with full access to the petitioner during school holidays with RM300 per month per child during that time, provided the respondent pays for the air fares between Kota Kinabalu and Kuala Lumpur.

Notes and conclusions

Its seems this was a marriage hastily entered into when the petitioner became pregnant. The elder son was born six and a half months after the marriage.

The respondent was not ready to support a wife. The respondent was away a large part of the time to pursue his sailing career leaving a young wife to cope with a child in what would be to her new surroundings. He expected she could cope. He sent her money. He also left her, it would seem, to deal with his bills. He had not denied nor did he give evidence that he paid his own credit card and other bills. His evidence that he decided to go their separate ways in 1992, and that he wanted her to take up employment and become independent in preparation for that, contradicts his own earlier affidavit. He had decided to give up on the marriage. To then complain of her association with a third party seems contradictory and confused.

The petitioner says she was not given money. Later, she admitted there was money sent, but was spent paying his bills. He alleges he sent money regularly, but no evidence is given to support that contention.

The petitioner is no better. From her own conduct in the court she appears intemperate, unable or unwilling to hold her emotions and temper in check. Despite the absences and neglect of the husband, the failure of this marriage cannot be entirely blamed on the respondent. A calmer and more temperate person would probably have given the marriage a better chance to survive. No marriage is a bed of roses, which in any case has its share of thorns.

Even before this court, each party is bent on blaming the other, pointing out the other party's alleged misdeeds, and offering scant apology or explanation for their own conduct. With the history of the parties' conduct, it is clear the marriage cannot survive. They have tried and they have failed. In part it is because of the failure of each party to acknowledge and admit his or her own shortcomings in making the marriage work.

What is clear from all this is that both parties share in the failure of the marriage. No single party is fully responsible. However, the marriage has failed.

The failure of the marriage is a tragedy. The greater tragedy is that if they fail to learn the lesson, any future marriage is also doomed. The greatest tragedy, however, is their two innocent children. Having married

because of the first child, the parties had a second child to save a failing marriage. Considering the reasons why the marriage was failing, having the second child was hardly responsible conduct. Particularly when the respondent went away sailing again. For the better part of his children's life, he was away.

On this pitiful background, this court is called upon to decide the question of custody. On this the duty of the court is clear. The award of custody is not to reward one party and to punish the party to blame for the failure of the marriage. Section 11 of the Guardianship of Infants Act 1961 ('the Guardianship Act') provides:

> The court or a judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

Parliament made its intentions clearer in 1976 in relation to custody. Section 88 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') provides:

> (2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:
>
> (a) to the wishes of the parents of the child; and
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> (b) to the wishes of the child, where he or she is of an age to express an independent opinion.

The wishes of the parents as to custody are in opposition to one another, therefore the court is left with the welfare of the children as the paramount or first and foremost, although not the sole, consideration.

As to wishes of the children, it is not disputed that when the mother came to Kota Kinabalu to take them, Caleb and in particular Joshua, had refused to go with her. At present, having been with the mother for some time, they told the court they would rather stay with the mother. Though the children seem contradictory in their expressed wishes, no doubt coached by the parent in whose custody they were in for the moment, the court perceives that what they seek and need most is some stability. They are still at an age when they cannot really determine what they want, and are easily persuaded. At about 12 or 13 they may be able to determine better. Also their views and preferences become more important as they get older.

We are concerned with the custody of two children aged ten and seven. Where the question to be decided is the custody of more than one child, the welfare of each child must be considered separately. Section 88(4) of the Act provides:

> Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

In considering this matter, it is seen that the constant amidst the incertainties, as far as the two children are concerned, is each other. Both

A are of the same sex. Their age difference of only three years explains their closeness to one another. It would only add to their trauma of having feuding parents for the two children to be separated at this juncture. The court has, therefore, decided that the interests of the children in this case are best served if they are not separated in any custody decision.

B The next question is which parent should have custody. Section 88(3) of the Act provides:

> There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

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Joshua is ten and Caleb is past seven years old. Both children are above the age at which there is a rebuttable presumption that they are better off with their mother.

D There is no presumption, therefore, applicable in favour of the mother or father for that matter.

The second part of s 88(3), however, stresses an underlying principle we should not overlook: 'the court shall have regard to the undesirability of disturbing the life of a child by changes of custody'. The starting point is, therefore, that it is undesirable to disturb the life of a child by changes E of custody. A party seeking an order for custody away from their current arrangements must therefore show that what he or she offers benefits the welfare of the children better. The court must evaluate whether the improvement to the welfare of the child is sufficient to justify disturbing the life of the child by that change of custody. It has to be shown there will F be positive advantages accruing for the welfare of the children by that change. Those advantages must be real and not merely promissory or speculative.

The respondent has a better paying job than the petitioner. The respondent obviously wants his children. They are coming to an age, particularly Joshua, where a father figure becomes increasingly important. G

The petitioner's financial position is by her own admission precarious. Yet despite the financial difficulties she too wants her children. If she had had to go out to work and leave them with her parents, the respondent was at least partly responsible by not providing for his family adequately. What cannot be denied is that, despite her difficulties, for the better part of their H lives, she has been there closest to the children. The children have been with their mother.

On the other hand, the respondent suggests he will have a servant. But the servant is not yet identified, employed and shown to have experience to help look after the children while he works. He assures the court he will I move out of his present place to live in a new apartment he has bought, or move into another house. He mentions there are good schools he could send his children to, but no acceptance or offer by any specific school is put forward. He has only put forth that he has an apartment or a house and

will engage a servant. These are, however, only assurances even though with the best of intentions. He has not shown what home he can give to his children. A parent, a house and a servant does not ipso facto constitute a home. On top of that much of what is put forward remains speculative. The best advice is for him to establish a stable home before making an application.

The petitioner may not have been the best mother, but she has managed. A home with her is what they are familiar with. The respondent has not shown on a satisfactory basis that he offers sufficient improvements to the welfare of the children as to justify disturbing the life of the children by a change of custody.

It has been submitted that the adulterous conduct of the mother makes her a person unsuitable to look after and bring up the children. The petitioner has admitted to living with a man for three years. Counsel for the respondent cited *Loura Dorris a/p Laurence v Thuraisingam a/l James* [1995] 2 MLJ 229, where this factor was taken into account.

The court finds that at least a substantial contributor to the failure of the marriage was the respondent due to long absences from his wife and failure to ensure adequate provision is made. The petitioner had not walked off from the marriage for no reason and asking later for custody to be taken from the father to be given to her. It was the respondent who was away most of the time. The children had been with her except when the respondent took them from Sungai Petani to Kota Kinabalu. There is a history of problems and efforts to cope.

The respondent himself said he decided to end the marriage in 1991 or 1992. There is also a previous pregnancy in October 1990 admitted by the petitioner. He had forgiven her then. They tried to make the marriage work again. The respondent gave evidence that in 1992 she went to work to enable him to obtain a master's certificate. He failed to obtain it. The children were much younger then. Adulterous or immoral conduct becomes a greater concern as the children become older and become more aware. But it appears both episodes are over.

Dubious as her conduct may be, the court is only concerned with the question of what exactly is the children being exposed to, and whether it is contrary to their welfare. Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. In *Loura Dorris a/p Laurence v Thuraisingam a/l James*, the mother remained a cohabitee with a married man. A woman who for no good reason walks out of a marriage to live with another man, then seeks to obtain an order that custody of her children be taken away from the husband and given to her will also likely fail in that application since walking off and leaving the children behind is not the right conduct of a mother.

The petitioner may have failed as a wife to her husband, but the question here remains whether she has failed as a mother to her children. The court in looking at all the circumstances of this case finds that she has not so much walked out of the matrimonial home as they never had much

of a matrimonial home established. She had her children with her. In the earlier adultery, the children were too small, and the respondent had forgiven that. The more recent adultery occured when the respondent himself recognized the marriage has failed and wanted to go their separate ways. To then make an issue of an association with another man seems contradictory without showing how an association with that person is contrary to the welfare of the children. Merely that another person has emerged in her life is not necessarily by itself bad for the children.

The court has taken into account also that if custody is given to the respondent, he will take the children to Kota Kinabalu. The petitioner's ability to utilize any access order is very limited given her financial circumstances. If custody were given to the petitioner, the respondent having better financial resources, would be better able to exercise his access rights.

If custody, care and control were awarded to the petitioner, her limited financial means is a concern. However, the maintenance and upkeep of the children is not her responsibility alone, but is one shared with the respondent. Section 3 of the Married Women and Children (Maintenance) Act 1950 provides:

> (1) If any person neglects or refuses to maintain his wife or a legitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make a monthly allowance for the maintenance of his wife or such child, in proportion to the means of such person, as to the court seems reasonable.

The petitioner is not seeking maintenance for herself. However, she seeks RM1,000 per month per child. Plainly this is too high a sum. It takes no account of the respondent's salary. There is no evidence he earns more than RM3,000 per month. While there is a legal obligation on the father to pay maintenance, it is not reasonable to order him to pay 66.7% of his salary ostensibly for just the children. The petitioner in wanting custody should also contribute. Accepting his salary is RM3,000, a generous budget for the children is about 30%. Taking into account the funds he has to set aside for air fares in order to exercise access to the children, the sum available for the children would be about 20% of his salary.

In his affidavit-in-reply, the respondent had offered:

> 12.2 the custody, care and control of the children Joshua and Caleb be given to the respondent with full access to the petitioner during school vacations. Alternatively, that the custody, care and control be given to the petitioner and respondent jointly with full access to the children Joshua and Caleb being given to the petitioner during school vacations and full access to the respondent during school terms.
>
> 12.3 the respondent give to the petitioner RM300 per child per month for the maintenance of the said children Joshua and Caleb during the period that the petitioner has full access to the said children and that the respondent pay for the air fare to and from Kuala Lumpur and

Kota Kinabalu when the children are required to travel pursuant to any orders made under para 12.2 herein.

The respondent had also said in testimony that for each child 'I think RM300 is enough. This I offered to the petitioner because she is working.' He himself recognized that such sums need be expended on the children. Yet he had not made such provision on the grounds the petitioner denied him access to the children. The petitioner is wrong to deny access. The respondent is also wrong not to provide some maintenance provision for the children, for it is the children who are denied and become hostage or victim.

To summarize, for guidance in similar applications, the court will normally favour the parent who will best maintain stability in the child's surroundings. There is no set standard as to what constitutes 'stability', but a judge looks for continuity in a child's life. To the degree possible, a judge will try to maintain continuity in, for example, a child's school, community and religious ties.

A court gives the 'best interests of the welfare' of the child the highest priority. What the best interests of the child are in a given situation depends upon many factors, including:

(1) the child's age, gender, mental and physical health;

(2) mental and physical health of parents;

(3) lifestyle and other social factors of the parents, including whether the child is exposed, for example, to second-hand smoke and whether there is any history of child abuse;

(4) the love and emotional ties between the parent and the child, as well as the parent's ability to give the child guidance;

(5) the parent's ability to provide the child with food, shelter, clothing and medical care;

(6) the child's established living pattern (school, home, community, religious institution);

(7) the quality of school — particularly important when one parent wishes to move; and

(8) the ability and willingness of the parent to foster healthy communication and contact between the child and the other parent.

It is to the best interests of welfare of the children that the state of feuding between the parents must cease. There shall be no bad-mouthing of one parent by the other to the children. There shall be no hiding of the children from the other parent. The children's relationship with each parent must be allowed to grow naturally, better still fostered by one parent for the other.

For all of the reasons above the court, therefore, orders:

(1) that the marriage be dissolved, to be made absolute after three months;

(2) that the petitioner shall have the custody, care and control of both children;

(3) that the respondent shall have access to the children during and for the duration of the school term holidays, during which he may take the children to stay with him;

(4) that the respondent shall pay maintenance in the sum of RM300 per month per child, provided such sum shall be reduced pro rata during the school term holiday for the number of days the children are not with the petitioner from 1 January 1996;

(5) arrears of maintenance from date of filing of petition to 31 December 1995 at RM100 per child per month, payable in equal instalments between January to June 1996; and

(6) liberty to each party to apply.

While the petitioner is given the custody, care and control of both children, it must not be forgotten the respondent remains the legal guardian. The court, therefore, further orders the petitioner to give full information as to all matters affecting the children's welfare and education pursuant to s 3 of the Guardianship Act, and the respondent's wishes so far as is reasonable shall be observed.

Order accordingly.

Reported by Sally Kee Seok Meng